DOCUMENT RESUME

ED 110 551 UD 015 365

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TITLE School Law: An Overview of Recent and Pending Court Action. Student Rights, School Finance and School Desegregation (With Emphasis on Student Rights).
INSTITUTION Tennessee Univ., Knoxville. Educational Opportunities Planning Center.
PUB DATE 28 Mar 72
NOTE 43p.; Speech presented at a session of the School Law Conference (University of Tennessee, Knoxville, March 28, 1972)

EDRS PRICE MF-$0.76 HC-$1.95 PLUS POSTAGE
DESCRIPTORS *Court Litigation; Discipline; Due Process; *Educational Finance; Equal Protection; *School Integration; *School Law; Student Attitudes; Student Responsibility; *Student Rights; Student School Relationship
IDENTIFIERS Serrano V. Priest; Swann V. Charlotte Mecklenberg

ABSTRACT

This speech, a transcript from the tape of the original presentation at a session of the School Law Conference held at the University of Tennessee reviews recent and pending court decisions in three active areas of School Law; school finance, school desegregation, and student rights, with an emphasis on the issues encompassing the latter. The Serrano v. Priest case covers the area of school finance, while the Swann v. Charlotte Mecklenberg and Richmond cases, along with President Nixon's proposed Anti-Busing Program constitute the desegregation area. The courts' reexamination and redefinition of students' rights reflect a problem area of school law. Court decisions reviewed are separated into two categories: substantive due process, dealing with specifics such as demonstrations, underground newspapers, dress, damage or destruction of property, weapons on school grounds, and others; and procedural due process. To supplement the minimum standards that exist to satisfy the latter's unfixed requirements, the adoption of a procedure code to handle expulsion cases is urged. Major provisions of such a code as a way of defining student rights to procedural due process are specified. (AM)

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SCHOOL LAW: AN OVERVIEW OF RECENT AND PENDING COURT ACTION

STUDENT RIGHTS
SCHOOL FINANCE
and
SCHOOL DESEGREGATION
(with emphasis on Student Rights)

by

Robert E. Phay

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EDUCATIONAL OPPORTUNITIES PLANNING CENTER

An Overview of Recent and Pending Court Decisions in Student Rights, School Finance, and School Desegregation

by

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This is a speech presented at a session of the School Law Conference held at The University of Tennessee, Knoxville, Tuesday, March 28, 1972.

The Educational Opportunities Planning Center is supported by funds from the Equal Educational Opportunities Program of the U. S. Office of Education (Contract OE-6-37-012).

FOREWORD

Schoolmen have not always felt the need to understand much law in order to operate their schools. For many years the law of concern to most schoolmen was relatively static and unchanging, with rather clearly defined parameters under which to operate. Schoolmen generally knew how schools were going to be financed; and the line of authority was seldom questioned by students or even teachers. Furthermore, even when authorities were challenged, until just the past dozen or so years, courts of law generally have been reluctant to concern themselves with school-related matters, for one reason or another.

Modern-day educational leaders face an entirely new situation. Laws are changing almost daily, it seems, in virtually every area of concern to schoolmen. Without question, the major cause of these changes is the insistence of minority groups, students, and even teachers, on equal protection and opportunity under the law, and these groups have turned to the courts for assistance in attaining what they feel are their rights.

The courts have been particularly active in three areas of school law during recent years: school finance, school desegregation, and student rights. Recognizing that practicing schoolmen have little other than professional reading materials to help them keep abreast of the emerging law in these fields, the Educational Opportunities Planning Center and the Department of Educational Administration and Supervision, both in the College of Education, The University of Tennessee, Knoxville, conducted one-day conferences in Knoxville, Memphis, and Nashville, on

March 28, 29, 30, 1972, respectively, at which each one of these three topics of school law was examined by some of the best authorities in the country. Each conference day began with an extensive overview of the current and emerging law in these three areas. Mr. Robert E. Phay, Associate Director of the Institute of Government, The University of North Carolina, Chapel Hill, delivered the comprehensive overview at the Knoxville conference, with especial emphasis upon the area of student rights. Dr. Neil V. Sullivan, Commissioner of Education, Commonwealth of Massachusetts, an authority on school desegregation, delivered the overview address at the Memphis and Nashville conferences.

Clinics were provided at each conference for those who wished to explore the law in any of the areas in more depth. Dr. Kern Alexander, University of Florida, Gainesville, made the major presentation at the Clinic on School Finance; Dr. Robert Simpson, University of Miami, Coral Gables, delivered the major address at the Clinic on School Desegregation; and Dr. Larry Hillman, Wayne State University, Detroit, offered the major presentation at the Clinic on Student Rights. Drs. Dewey Stollar, Fred Venditti, and Larry Hughes, all from The University of Tennessee, Knoxville, coordinated the respective clinics.

The conference was blessed with exceptionally competent addresses by the above named authorities. At the conclusion of the conference, the Planning Committee, consisting of the clinic coordinators and myself, agreed that the presentations deserved transcription from the tapes and distribution to educators throughout the State of Tennessee. The

attached paper has been transcribed from the tape of the original presentation and edited only to clarify wherever necessary or to delete superfluous materials.

The presentations by each of the five major speakers is being bound separately and will be distributed whenever completed. The editors realize that one seldom speaks the way one writes, but we felt that those who heard the speeches could appreciate them more were we to make the transcriptions as faithful to the actual presentations as we could. We hope that the reader will recognize that the papers do not represent the actual writing styles of the authors.

M. Everett Myer
Conference Director
and
Associate Director, EOPC

SCHOOL LAW: AN OVERVIEW OF RECENT AND PENDING COURT ACTION
(A speech presented to the Knoxville session of the three-session School Law Conference on March 28, by Robert E. Phay, Institute of Government, The University of North Carolina at Chapel Hill)

INTRODUCTION

This morning I am to talk about "School Law: An Overview of Recent and Pending Court Action." That's the subject of a course that takes me a full semester to teach in our law school! Litigation in the school area has become so great in recent years that with limited time, one can only hit the high spots of selected areas. Today my selected areas will be three - finance, desegregation, and student rights.

SCHOOL FINANCE

Serrano v. Priest

The major recent development in the area of school finance is the already famous case of Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1971), a bombshell that was dropped on the largely unsuspecting world of public education last August by the California Supreme Court. [For a complete analysis of the Serrano case, see John Dees, "Serrano v. Priest: Implications for Financing Public Schools," Popular Government, 38, No. 4, (December 1971). This discussion borrows greatly from his article.] It overturned the California system of public school financing, a system that all states except Hawaii follow to at least some extent. Since that decision, the financing systems of Arizona, Minnesota, New Jersey, Texas, and Wyoming have been overturned, and in over half the states suits have been filed (40 in all) that seek the remedy granted in

Serrano. (Although my most recent check indicates that no similar case has yet been filed in Tennessee, I think it would be folly to think that Tennessee will not have one in the near future.) The feature common to those systems upon which the courts have focused is the heavy reliance upon locally raised funds to support public schools. Rich school districts with wider tax bases can provide high quality education more easily than can poor ones. Thus school children in poor districts are being deprived of a right to equal opportunity of education in their public schools, so the Court has said, in violation of the equal protection clause of the Constitution's Fourteenth Amendment. (This is the same clause upon which most desegregation decisions have rested.)

Although a number of educators and legal commentators had anticipated the equal protection argument made in Serrano, its success surprised those who were aware of the decision of McInnis v. Ogilvie, 394 U.S. 322, (1969), a summary decision of the United States Supreme Court that had held the financing plan in Illinois to be valid when a similar attack was made. The lower California court had in fact followed McInnis in dismissing the Serrano suit but, nonetheless, the state supreme court reversed the lower court's decision and remanded the case for further hearings.

The Serrano decision was nearly unanimous--only one of seven justices dissented. It seems likely, to me, that the United States Supreme Court will reconsider its decision in McInnis, especially in light of the court decisions following Serrano. If the Court takes the position

of the California Supreme Court, the ramifications will be extensive for Tennessee and other states.

Even though most of you are school administrators and not lawyers, I think that it would be useful to explore briefly the legal theory developed in Serrano. The California finance system was overturned because it violated the equal protection clause of the Fourteenth Amendment, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

A court, in examining a statute or state constitutional provision that is attacked on the basis of denial of "equal protection" must first attempt to identify the provision's purpose. If a statute's purpose is discriminate between similarly situated people without good reason, it is unconstitutional. When a statutory classification is based on race, e.g., a statute assigning students to different schools on the basis of race, it is unconstitutional. Other types of classifications, such as who may have a license to sell liquor and age requirements on the right to vote, are, in certain situations, permissible. You see, statutory classifications are permissible if they meet certain constitutional standards.

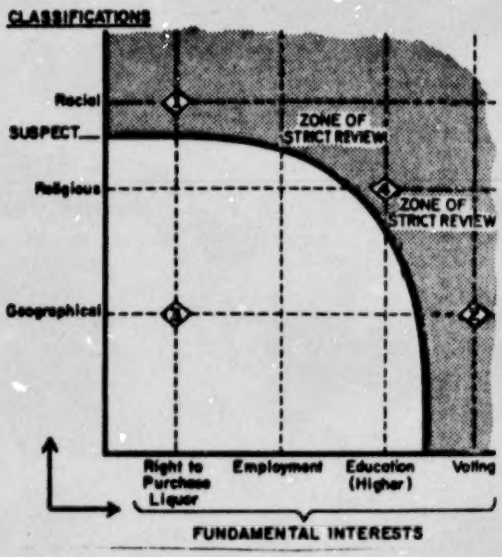
What we are dealing with in the Serrano case is a statutory scheme for financing schools in California that took into consideration and relied heavily on a classification based on wealth. The Court had to decide whether this classification is constitutional under the Fourteenth Amendment.

Now, most statutes have several identifiable purposes. If you looked at a typical statute, you could probably identify at least four or five reasons for its enactment. And if one purpose is constitutional and another purpose is not, under traditional equal protection analysis the former automatically prevails. In other words, if a statute has one constitutionally legitimate purpose, that single purpose usually suffices to uphold the constitutionality of the entire statute.

In recent years, however, a new and more active test of equal protection, commonly called the "new equal protection," has developed. Whereas the concept of traditional equal protection is typified by judicial restraint--by court reluctance to overturn a statute and say that it is unconstitutional--the "new equal protection" analysis subjects fact situations to new inquiries. The primary concern is what kind of classification is used. When the classification is based on race, or lineage, or alienage, the classification is suspect, and the court demands rigid scrutiny in its examinations of the circumstances.

Let me illustrate with a graph. (See graph on next page.) Along one axis of the graph we run the types of classification; along the other axis we run the types of interest. At the bottom of the axis of classifications are those that do not pose much of a problem. For example, classifications made on geography usually do not create much of a constitutional problem. However, as we move up the axis toward classifications based on sex, wealth, and race, we get into classifications that the courts have said are suspect. The Court scrutinizes these

classifications and puts the burden on the state to prove the constitutionality rather than using the traditional assumption that the statute is constitutional until proved otherwise.



In Serrano, involving districts that varied widely in the amount of property value that was available for taxation, the classification was based on wealth. This is a classification, like race and sex, that is suspect. The Court is saying, "We are going to look very hard at it."

On the horizontal, or bottom axis, we have interests that vary in their importance as basic rights. For example, we do not allow a fourteen-year old to purchase liquor, while we allow someone eighteen or twenty-one to do so. We feel that this is a reasonable classification in which no one has been fundamentally deprived, and we are confident that the courts will look no further. However, at the other end of the axis are such interests as the rights of criminal defendants and voting.

These interests are in the suspect area, and the courts apply a more rigorous scrutiny of the statute. When a high index occurs on both of these axes--both in the classification and in the interest--then we enter this zone of very strict court review.

When the legal standard to be used has been stated, the facts in the case must be examined to determine whether they violate the standard. In Serrano, the plaintiffs brought a class action for all public school pupils and their parents except those in the school districts afforded the greatest educational opportunity in the state.

The financing scheme under attack relied on the local property tax as its major source of revenue. The assessed valuation per pupil of the real property in the richest district in Los Angeles County, Beverly Hills, was thirteen times the assessed valuation per pupil in the county's poorest district, Baldwin Park. An inequality in available tax resources resulted because those parents living in wealthy districts could pay at a much lower rate of taxation than the parents in the poorer district paid and still provide their children with a much higher level of financial support than could parents in the poorer district. The Court assumed that higher per pupil expenditure resulted in a higher quality of education. Now, you may question that assumption, but nevertheless, that is an important assumption made by the Court.

I might also note that misinformation about Serrano is widespread, and one bit of misinformation is that the decision outlawed the use of the property tax in California for the use of public finance. It did

not do that. It said the way that property tax revenues were used was unconstitutional, not the tax. The situation faced by the Court might show this.

The California Supreme Court cited these conditions and then approached the issue of whether the particular arrangement merited the strict review that we have talked about under the equal protection clause of the Fourteenth Amendment. In this vein, it first considered whether wealth is a suspect classification. Its conclusion was affirmative, reached after a brief analysis of five or six United States Supreme Court holdings.

The Court then moved to whether education is a fundamental interest and found that it was. The Court acknowledged, however, that the contention that education is a fundamental interest "is not supported by any direct authority." Nevertheless, the factors calling for finding education a fundamental interest were listed by the Court as follows: that education is the main hope for the poor and oppressed who want to improve their position in life; that everyone benefits from education, not just a few people; that a child's personal development is molded in a manner chosen by the state; and that education is compulsory for all children. After it reviewed all of these factors, it said, in short, that since education is a major social and political determinant, it must be a fundamental interest for all students being processed through the system. The California Supreme Court applied the strict review and found the school finance system to be unconstitutional.

Let me emphasize that the right set forth in this decision is not to some minimum standard of education; rather it is to a standard of education equal to that enjoyed by those in the school unit enjoying the greatest educational opportunity. The standard of education is measured in terms of dollars available per student in the respective school districts.

This discussion of Serrano will no doubt leave you with many questions about some of the assumptions made by the Court, its implications for the Tennessee system of finance, and questions about the options open to you if Serrano or a case like it becomes the law for Tennessee. It seems almost certain that the Tennessee system of financing schools would be found unconstitutional, if Serrano or a case like it becomes the law of the land. I recommend that you start thinking soon about the options available to you, and to anticipate some of the problems a Serrano type of decision might create for you. They will be many.

DESEGREGATION

Swann v. Charlotte-Mecklenburg

Recent developments in the area of desegregation can well be broken down into three areas: the latest Supreme Court decision of Swann v. Charlotte-Mecklenburg, lower federal court decisions, and President Nixon's recently proposed legislation to limit busing. First the Swann decision.

In April 1971, the United States Supreme Court delivered one of its most important school desegregation decisions since the 1954 decision

in Brown v. Board of Education. In Swann v. Charlotte-Mecklenburg Board of Education, considered in conjunction with four companion cases, the Court sustained the federal district's court order that had required substantial busing to desegregate schools. In a 32-page opinion, the Court attempted to clarify several key issues. First, it said it would not attempt to define a "unitary school system." It pointed out that "conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations," and reinforced this point in discussing the scope of permissible transportation of students: "No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations."

These statements by the Court hardly came as a surprise. One of the problems I have had with people who demand a definition of a "unitary school system" is explaining to them that they ask for the impossible. In Swann the Court has said just that: so much depends upon each local situation that the Court can give only very broad guidelines as to what meets the requirements of the equal protection clause of the Fourteenth Amendment.

To deal with each school community's unique situation, the Court emphasized the broad powers and affirmative duty of school boards to eliminate school segregation. It also stressed the broad, equitable powers of the district courts in fashioning a remedy to assure a unitary school system. These powers include: altering attendance zones to allow pairing or grouping of noncontiguous zones on a racial basis and requiring

the necessary busing; ordering the consolidation of schools; establishing faculty ratios based on race; insuring that future school construction and abandonment are not used to reestablish a dual system; using a racially based mathematical ratio of students as a starting point in shaping a remedy; and adopting an optional majority-to-minority transfer plan.

In discussing racial quotas, the Court said that while they may be a useful starting point in formulating a plan, "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

In considering the constitutionality of "one-race schools," the Court said:

> . . . it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law.

The Court also noted, in ruling that busing was permissible to dismantle the dual system, that the use of busing is to be limited by consideration for the children's health and the educational process.

Chief Justice Burger, in speaking for the Court, commented about future review of school systems once they are in compliance:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems will then be "unitary" in the sense required by our decisions in Green and Alexander. It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts

> are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that Federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

In a memorandum accompanying his refusal to enjoin the implementation of a desegregation plan in North Carolina, Chief Justice Burger reemphasized two of the major points he made in the Supreme Court's opinion in Swann. He quoted the Swann opinion's language that the racial composition of the schools need not reflect the composition of the school system as a whole and restated the limits on busing that I have just noted. Finding that busing was an "absolutely essential" tool for dismantling a dual system, the Court noted that just as race must be considered in determining whether a constitutional violation has occurred, so must it be considered in shaping a remedy. Accordingly, school boards must be permitted to assign students on the basis of race.

In a companion case considered with Swann, the Supreme Court reversed a Georgia Supreme Court decision and held that assigning pupils by race to achieve desegregation was constitutionally required and that the restrictions on busing of Title IV of the 1964 Civil Rights Act did not prevent state and local authorities from using busing as an aid in desegregating their schools.

The Richmond Case

The second area of development in desegregation is the lower federal court decisions. For time's sake, let's deal with only one case, the federal district court opinion that ordered the consolidation of the Richmond city school district (70 per cent black) and two contiguous county school districts (each 90 per cent white). The court held that because local school boards delayed in desegregating the city schools, desegregation could no longer be accomplished within the city school unit's boundaries. The court found the three districts to be part of a state educational system and that county and city lines had not been a barrier to previous state-sanctioned plans designed to avoid desegregation. Under those circumstances, the federal district court ordered the combining of the separate school units as a necessity in the metropolitan area. [On June 5, 1972, the Court of Appeals for the Fourth Circuit, sitting en banc, reversed the district court opinion. An appeal has been filed with the United States Supreme Court.]

The Richmond order, which would have involved busing 78,000 of 104,000 students, is one of the court orders that President Nixon had in mind in his March 17 speech to Congress--which brings us to the third desegregation area I want to comment on.

President Nixon's Proposed Anti-Busing Program

The President's proposed anti-busing program--the $2.5 billion Equal Educational Opportunities Act of 1972--is aimed not at the Supreme Court but at the federal judges who he argues have gone beyond the

requirements of the Constitution as the Supreme Court has interpreted them. In seeking legislation that would stay any further court orders requiring busing until July 1, 1973, and permitting school boards operating under existing busing orders to demand that a federal court reopen that order and modify it to conform to the proposed legislation, the President was undoubtedly thinking of the busing plans for Richmond, Dallas, Detroit, Denver, Corpus Christi, and Nashville. According to HEW Secretary Elliot Richardson, who testified on March 24 before a Senate education subcommittee, all but about 100 school district ordered to institute busing since May of 1971 could seek to reopen their desegregation cases if Congress approves President Nixon's new busing proposals. If such legislation is enacted, it will surely be challenged; and if it seeks to prevent the courts from requiring the desegregation of schools as required by the Fourteenth Amendment, it will not prevail. I leave to the clinic sessions the discussion of its likely success in the Congress and the courts and the likelihood of the President's receiving the $2.5 billion he has requested for remedial education.

STUDENT RIGHTS AND SCHOOL RESPONSIBILITIES

Introduction

One of the most difficult problems facing school boards and school administrators today is how to handle student disruption and misconduct. The daily newspapers make us fully aware that almost constant crisis stemming from student protest or misconduct attends our public schools. A U.S. Office of Education study on school disruption found that three

out of five high school principals reported student protests in their schools. The National Association of Secondary School Principals reported that 60 per cent of all high schools had experienced some kind of student protest during the 1970-71 school year. And the most comprehensive study to date--of the nation's 29,000 public and nonpublic high schools by the House Subcommittee on General Education--reports that 18 per cent of the nation's high schools had a serious student protest. Serious protest was defined as student activity involving use of strikes, boycotts, sit-ins, underground newspapers, or riots. So we are talking about situations that many of you either have experienced or will experience.

Student protest and misconduct have frequently resulted in suspension or expulsion. My purpose here is first to examine the types of student conduct that are the basis of school discipline (focusing primarily on suspension and expulsion) and determine when the conduct is constitutionally protected as a student right, and then to examine the rights of the student in the type of procedure that must be given him when the school seeks an expulsion or long-term suspension. I hasten to add, however, that we are not only talking about student rights, but also examining the schools' rights and responsibilities in curbing student conduct when it poses a threat to school operations and the rights of other students to a public education.

The courts are now reexamining and redefining student rights and the school's power to regulate student conduct. One reason we are getting so many court decisions in this area is that students and their

parents increasingly are turning to the courts to enforce what they consider to be a right. When you and I went to school, if we got a spanking at school, we fully expected a second measure of it when we got home. But today, parents are more likely to respond with "What did they do to my child?" and "Where's the nearest lawyer?" Courts have also paid less attention to the in loco parentis concept, and the resulting judicial scrutiny has begun to define the extent and limits of the school's power to control student conduct. Most of the cases reviewed here are not U.S. Supreme Court decisions or opinions of state and federal courts that apply directly to Tennessee schools, but they show the general state of the law as it emerges. I have, however, read the Tennessee statutes on the subject to see how they apply to this emerging law.

A. Substantive Due Process

Substantive due process deals with the conduct of the student. Our review of this area is concerned with the types of conduct that are constitutionally protected when the school says that a student may not do a particular thing. I have broken the types of student conduct that often result in school discipline into several categories. We will examine these areas to determine what the courts have labeled protected and can be prohibited by the school.

Demonstrations, Armbands, Freedom Buttons, and Speech

Student demonstrations have raised the question of student rights of freedom of speech and assembly. It is clear today that the student does not leave his constitutional rights at the schoolhouse door: The

fact that he is a student does not deprive him of First Amendment rights of speech, press, and assembly. The wearing of armbands to protest is an example of the protected First Amendment right. Thus if a student wears a black armband to show opposition to the Viet Nam War (as in the celebrated Tinker decision), the school cannot require him to remove it or expel him if he refuses to remove it unless the school can show that the armband "substantially and materially" interferes with the operation of the school. The U. S. Supreme Court has held such conduct to be symbolic speech protected by the First Amendment. Similarly, in the absence of disruption, students may wear freedom buttons, German iron crosses, or George Wallace campaign hats. Unless the student's conduct involves substantial disorder or invasion of the rights of others, he is protected by the constitutional guarantee of freedom of speech. He may not, however, in the name of free speech block passageways, abuse school property, or obstruct normal school operations.

Underground Newspapers and Obscene Literature

Possession of literature that is considered obscene or distribution of an underground newspaper on school grounds may raise another free speech issue. In a recent Michigan decision, a federal court held unconstitutional the expulsion of an eleventh grader for violating a school policy prohibiting the possession of obscene literature. In that case, the words objected to were in some magazines the student had but were also in Salinger's The Catcher in the Rye, an assigned novel in an English course. Although the court found the board regulations to be in

an area of speech that the board could attempt to regulate, it found the burden to be on the school, rather than on the student, to define what is obscene. The school board cannot just say that obscene literature is prohibited without telling the student what is obscene. The court itself felt incapable of defining obscenity, considering the murkiness of this area of the law.

In the area of underground newspapers, the Seventh Circuit Court of Appeals [Scoville v. Board, 425 F.2d 10 (1970)] recently affirmed the reinstatement of two students who had been expelled for distributing (selling) a paper that was critical of the school administration ("The Dean has a sick mind.") and urged other students to disregard school rules. The Court said that without evidence of actual disruption, a school board must be able to show that the publication's writing and distribution could reasonably have led the board to forecast substantial disruption of school activities. A more recent Texas case is in accord. See also [Eisner v. Stamford, 440 F.2d 803 (2d Cir. 1971).]

There are limits, however. As the New Jersey Commissioner of Education has said, the school need not and should not permit distribution of hate literature that scurriously attacks people or groups for religious or racial reasons. He also said that the school can prohibit the distribution of documents that have misleading or faulty contents and are likely to provoke counter-attack by pupils to whom addressed.

In a case in my own school district [Cloak v. Cody, 449 F.2d 781 (4th Cir. 1971)], a student tried to sell newspapers on the school ground. There was a school board regulation specifically authorized by state

statute, prohibiting the sale of any merchandise on the school grounds unless it was approved by the board. The school board had an obvious interest in not allowing just anyone to come in and peddle his wares, and the district court upheld this prohibition. The lower court said that the student could not be prohibited from giving the papers away but he could not sell them. On appeal the Fourth Circuit Court refused to review the constitutionality of the North Carolina statute and the school's action taken pursuant to it because the student had left the state.

School Publications

School control over official school publications, such as student newspapers or yearbooks, falls into an unclear area of the law. The case of Dickey v. Troy State University, 402 F.2d 515 (5th Cir. 1968), established that a student editor may not be expelled for writing "censored" over the space where the editorial he had been told not to publish would have appeared. The question of the type of censorship that school officials may exert over student publications, however, has not been clarified by the courts. It seems clear that school officials can require the student editors to comply with state laws respecting libel or obscenity but cannot prohibit editorials on controversial subjects unless they threaten to "materially disrupt"--again the language of Tinker--school operations. Several college cases have upheld student rights to print controversial articles, and a recent high school case upheld the right of students to buy space in the student newspaper to

advertise an unpopular political position, i.e., their opposition to the Viet Nam War. In this latter case, the principal prohibited the ad on the basis that it was not on a school-related activity. The court declared that the First Amendment guarantees students the right to publish their paid advertisement in the school paper like any other person who wanted to buy advertising space.

We have a number of later decisions that are also interesting. One is a federal district court decision in North Carolina that was handed down very recently. The suit involved a student newspaper at a predominantly black institution in which the student editors said that the paper would accept no advertisements from white businesses and that they would not permit white students to serve on the staff. They also editoralized that the growing white enrollment was contrary to what they thought their institution should be. The president of the institution said, "This is a late time for us to be getting into reverse racism and I am not going to use student fees to support that type of magazine or that type of student paper." The court said that the students have a First Amendment right to say what they want to in this regard even if the university could not engage in such speech without violating the Civil Rights Act. The court said the only solution is to get the school out of the business of financing the student paper, since he found the paper to be a state agency that nevertheless engaged in speech and conduct not permitted of a state agency. The court said that the paper would be independently operated henceforth. Whatever one may think

about this conclusion, the case shows some of the problems we are getting into with student newspapers.

Another interesting case concerns Fitchburg State College in Massachusetts. The editors of the student paper printed an article by Eldridge Cleaver, against the president's express prohibition. The president withdrew financial support of the paper. The students then obtained an injunction and forced the reinstatement of school funding. The court said that once an institution creates an organization like the student newspaper it is foreclosed from eliminating it for this type of reason because to do so would violate the free speech of the students.

Hair Length

Judicial opinion has been and is still divided about prohibiting long hair on males. Some courts have upheld suspensions for wearing long hair while others have held that having it long is a constitutionally protected right. In Tennessee, however, the law is fairly clear. The Sixth Circuit Court has upheld school regulations prohibiting long hair on males in at least two recent decisions. In Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), cert. denied, 400 U.S. 580 (1970), and Gfell v. Rickleman, 441 F.2d 444 (6th Cir. 1971), the courts found that excessively long hair on male students disrupted classroom atmosphere and caused disturbances and thus such regulations were not arbitrary. These rulings are controlling in Tennessee. I will say, however, that more and more educators feel that education is simply too important to be granted or denied on the basis of personal appearance and that as long

as the student's appearance does not disrupt the educational process or pose a threat to safety, it should not concern the school.

Dress

Another sensitive area is the regulation of the length of girls' skirts and student dress in general. Without question, school authorities may prohibit obscene dress of students or teachers or dress that is clearly inappropriate, such as bathing suits, spike heels, and hats in the classrooms. But they no longer can require that a uniform be worn to school, and a school dress code prohibiting girls from wearing slacks has been invalidated in New York. In New Hampshire, a rule banning dungarees was held to be unconstitutional, and in New York, a suspension for wearing a "slack suit" was overturned. In Texas, however, a regulation prohibiting pants suits was upheld. Nevertheless if short skirts or other extreme clothing can be shown to be provocative and disruptive of the educational process, the school's legitimate educational concerns may outweigh the student's personal tastes. The difficult question is what is a "reasonable" regulation--i.e., how short is too short?

Question from floor: Must actual disruption have occurred before a school board regulation can be sustained?

Answer: No. But if there is not actual disruption, you have a heavy burden to show that disruption is likely to occur. A Tennessee case that is instructive on that point is Melton v. Young. It came from the Eastern District of Tennessee (Chattanooga), and the court permitted the school to forbid the wearing of a

Confederate symbol on a student's shirt sleeve on the grounds that there had been a long history of disruption in the school, although no disruption as to that specific symbol had occurred to date.

Now, when you have restricted student conduct because you have a volatile situation, it is important for the school to introduce evidence to prove the situation if you hope to be sustained by a court. Let me add, however, that the language of Justice Fortas in the Tinker decision on this point is important: The school has a responsibility to control those people who react against what they do not like to hear or see--because that is what First Amendment free speech is all about. If we were only talking about speech that people wanted to hear or things that were not controversial, there would be no problem. The test of free speech is whether the speaker is permitted to say even things that people do not like to hear--when you've got someone spouting an opinion that makes your blood boil. The Supreme Court said very plainly in Tinker that the school's responsibility is to control those who over-react. The school should say to Johnny that he must not hit Tom because Tom is wearing a black armband, or because he has long hair, or because he's wearing a George Wallace hat. These acts are all within Tom's constitutional rights. Thus the burden is on the school officials--to come back to the current question--to show that disruption was imminent and that the school could probably not prevent it.

This burden, incidentally, is easier to meet in Tennessee than it is in my own state. For example, the evidence that was introduced to show disruption in the Tennessee hair decisions, would not get to first base in North Carolina. For example, one statement introduced by a North Carolina school board in support of its short-hair requirement was that boys with long hair were a danger in chemistry lab. Well, that is nonsense. Schools don't exclude girls with long hair from the chemistry lab. If long hair becomes dangerous, then a hair net can be required, as it is for people serving food.

This type of examination, however, has not been made by Tennessee courts. Thus a lower standard is required in Tennessee than is required by the fourth, second, or seventh circuit courts.

Violation of Criminal Law Off Campus

Several courts, though none in Tennessee to my knowledge, have held that a school may suspend or expel a student when he commits a crime off campus. However, the school must show that the out-of-school conduct has a direct and immediate impact on the school and that this finding was made by the school.

Damage or Destruction of Property

Willful damage or destruction of school property and private property is another basis for expulsion. Negligent and careless acts of property destruction are not proper basis for such severe discipline. Tennessee has a Parental Responsibility Act that requires parents to

reimburse a private or public school for deliberate damage to school property up to $2,500.

Weapons on School Grounds

Schools have not only a right but a responsibility to prohibit weapons on school grounds and to suspend students if necessary to enforce regulations prohibiting them. A Tennessee statute (Tenn. Code Ann. Sec. 49-1309), in fact, requires it.

Time does not permit us to examine several other areas of student rights--for example, picketing and the confidentiality of student records. The important thing to remember about student rights and school board authority to control student conduct is that the student's constitutional rights are being balanced against the duty of the school board to continue and protect the public school system--to protect the right of the other students in obtaining an education. To help you clarify your own thinking and to make your policies on disruption plain to the public, school boards are well advised to adopt a written policy on student conduct. Even if you have such written regulations, a review of your policy in the light of recent judicial rulings would be worthwhile. The Institute of Government has recently produced a guide for developing school board regulations. A copy can be obtained from the Institute for $3.00.

B. Procedural Due Process

We now turn to the procedural aspects of long-term removal from the school and what constitutional due process requires before such an action may be taken. Until recently few procedural requirements were

placed upon the school when it decided to suspend or expel a student. Education was considered not a right, but a privilege, and school expulsions were generally not reviewed by a court. Today education is considered a right that cannot be denied without proper reason and unless proper procedures are followed. Courts now require that students be accorded minimum standards of fairness and due process of law in a disciplinary procedure that may terminate in expulsion.

The requirements of due process are not fixed. What is required depends largely on the severity of the school's action, and no particular procedural model is imposed. If the only penalty that may be given is a spanking or detention after class, no formal procedure is required. In cases of severe discipline, such as long-term suspension or expulsion, minimum standards are generally thought to include (1) adequate notice to the student of the charges against him and the nature of the evidence to support those charges, (2) a hearing, and (3) a disciplinary decision that is supported by the evidence.

To be sure that procedural due process is provided to students in expulsion cases and to provide for an orderly and clear way of handling expulsion cases when they arise, I strongly recommend that your school board adopt a "procedural code" for handling alleged violations of your "expulsion code." (The booklet of model codes that I mentioned earlier contains such a procedural code. It was written to help schools develop such a code.) I want to discuss the major provisions of such a code as a way of defining student rights to procedural due process.

1. Notice. There are several aspects of notice.

a. The first aspect of notice is forewarning; i.e., students must be told precisely the type of conduct that will result in an expulsion. For example, a school rule or statute prohibiting "extreme hair styles," or "wearing provocative symbols" lacks the specificity required in giving proper notice. Thus it is important that school boards adopt written regulations on student conduct and that these regulations be stated with as much clarity and detail as possible.

The Chattanooga Confederate symbol case, Melton v. Young, can be used to illustrate this point of notice. In this case, the student was told to take off his Confederate badge but he refused to do so. He then returned to class and created additional problems. He was called back into the principal's office; again the principal told him to take off his badge. He refused, and the principal sent him home. The next day the student returned, wearing his badge. The principal told him he could stay if he took his badge off. The student again refused. Notice was clearly given here. The student was told what conduct would result in his expulsion, and in this case was given an opportunity to correct it.

The objective of written regulations is to clearly let the students, the parents, and all the constituents that make up your school know what conduct is not permissible. Thus it is important that you adopt regulations with as much clarity and detail as possible.

b. The second aspect of notice is that a written statement must be provided specifying the charges and the nature of the evidence

to support the charges. How detailed the notice should be will depend on the circumstances. "The minimal test for adequacy of notice will be whether the student understood the substance of the charge against him."

c. The third aspect of notice is that adequate time to prepare must be given. Notice must be far enough before a hearing to enable the student to prepare a defense. (In Whitehead v. Simpson, 312 F. Suppl. 889 (E.D. Ill. 1970), two days was held sufficient.) In other words, you can't kick a student out at 11:00 o'clock and hold an expulsion hearing at 1:00 o'clock.

d. The fourth aspect of notice is that the student must be informed of his procedural rights. A printed code will satisfy that.

Question from floor: What is the school's responsibility as far as parents are concerned? Do you have to notify the parents or just give notice to the student?

Answer: You need to notify the parents. In most cases you are dealing with a juvenile, not an adult. In the compulsory attendance law, for example, the legal action runs against the parents. You cannot get away from the parental responsibility.

A good procedure is to notify the parent by telephone and send him by registered mail a statement that explains the rule that has been violated and the evidence that substantiates that violation. I have been told by school administrators that they have had students who beat the mailman home and signed for the registered mail. That is one reason I think that you should personally telephone the parent.

Allow me to make a side point. In releasing a student during the school day, it is a mistake to send him home by himself. I know of one instance in which a student was expelled at 11:00 o'clock and found three weeks later in San Francisco. That is one risk you run. Another possibility is that the student might commit a crime or get hit by a car. In any case, I think you need to deliver the child to a parent or keep the student in the school building, if his parents are not available. If he remains in school, you can find a place where he can be separated from the other students, until his parents pick him up or you send him home on the school bus.

Now, in almost anything I say, you can find exceptions that do not fit the rule. If you have a large disruption involving a hundred students, maybe the only thing you can do is send everyone home on the spot. That may be the only responsible action. The school should then attempt to notify parents that their children are on the way home and that they should find out where they are.

Question from floor: Does the school board bear this responsibility rather than the principal or anyone else?

Answer: The school board is the corporate body that is legally responsible, but it should delegate much of its responsibilities to its administrators. My own personal view on school administration is that the further you can delegate down, the better your school operates. In my opinion, the principal should be the one with primary responsibility for the operation of his school. I think

the superintendent should develop with his principals a checklist of things to do when emergency situations develop. I also recommend that the school board develop a "war plan" to deal with a major disruption. While in the Army, I was on orders as the S-2 officer for my base. We had several war plans we hoped we would never use. School boards need something similar. It is foolish to think that you will never have a mass demonstration in which you may have to call in the sheriff's department or, in the event of fire, the fire department. The fire department, for example, should know the entrances and fire hatches to school buildings and not have to depend on the principal for this information during a crisis period.

I also think you need to adopt regulations, worked out with your police, on interrogation, arrest, and search and seizure in the school. We need to develop these regulations with the principal and to look to him as the one primarily responsible for implementing them in the school house.

Now, any principal would be foolish not to notify the superintendent immediately and get what consultative help he can. That is only good judgment. But the person on the firing line, usually the principal, sometimes doesn't have that option. He often has to act immediately.

I don't intend to be "law and orderish" on this subject, but I think what I have recommended makes good sense. Emergency situations do occur. This year two people were killed in Wilmington,

North Carolina, and a school was burned down. You no doubt can cite similar instances in Tennessee. Failure to prepare is being delinquent in one of your responsibilities.

Question from floor: Are you using responsibility as synonymous with liability?

Answer: No. A distinction needs to be made there. Responsibility goes far beyond the legal liability. You have a responsibility to see that your schools operate properly and with a minimum of disruption. In most cases there will not be legal liability on the part of the principal because his judgment was poor. I am using responsibility in the broader sense.

2. Hearing. The basic requirement of a hearing is that one have an opportunity to present his case before an impartial hearer. The idea of due process is an expanding one. Although I have been reviewing what is required when an expulsion is contemplated, the concept is also being expanded into other areas. For instance, a recent New York case required a hearing on the revocation of a high school athletic letter. Thus the right to a hearing may be extended to lesser penalties.

3. Legal Counsel. A right to legal counsel has not yet gained general acceptance as a due process requirement in school discipline cases. Although a few cases have suggested that a right to counsel does exist, most have refused to require legal counsel as a necessary ingredient to due process. If, however, the student cannot obtain a fair hearing without assistance (for example, if neither he nor parents speak

English) or if the school board has an attorney to represent it, then counsel should be required to satisfy due process.

4. Trier of Fact. Who is to hear the proceeding? The trier must be impartial. [See Perlman v. Shasta Junior College, 9 Cal. 3rd 973 (1970).] To establish personal bias, a strong case must be made, but the student should have opportunity to prove bias.

Constitutional law does not require a jury or even a hearing board, but the Tennessee statutes require the board of education to hear the expulsion. I recommend that the Tennessee statutes be amended to allow the school board to establish a panel in expulsion cases that contains no administrators, but is made up of parents, students, and teachers. Large school systems have more cases than the school board can hear. In such cases the board may want to consider the use of hearing examiners.

5. Witnesses. There are three major issues concerning witnesses--right to cross-examination, confrontation, and compulsory production. All three are found in criminal proceedings, but they have not generally been found to be required as a matter of procedural due process in schools. However, if expulsion hinges on the credibility of the testimony, then cross-examination and confrontation may be essential to a fair hearing and be necessary as a requirement of due process. A school board may we well advised to go beyond present legal requirements in providing these essentials to the student.

6. Self-Incrimination. Does the Fifth Amendment apply to students? This issue is most frequently raised when both a school and a criminal action are pending. When the issue has been litigated, the school disciplinary proceeding has not been considered sufficiently criminal in nature to require the application of this Fifth Amendment protection. In other words, the schools can require testimony from students. Courts have distinguished school disciplinary proceedings from juvenile court proceedings in which juveniles are protected by the Fifth Amendment. Also, a Miranda-type warning--a reminder to suspects of crime that they may refuse to make self-incriminating answers to questions and may have the assistance of a lawyer in answering questions--is not applicable to the school proceeding. Again, I feel that even though a school may legally require self-incrimination by students, a school board has more to gain by not requiring the student to testify.

7. Sufficient Evidence. Action can be taken only if it is supported by substantial evidence. This is a minimal requirement of due process. A recent Indiana case ruled that the school procedures for suspending or expelling a student should provide a standard as to the quantum of evidence necessary to support disciplinary action. In a Florida case, an expulsion was vacated when the board gave as its reason for expulsion no more than that the student was "guilty of the misconduct as charged."

8. Search and Seizure. Until recently, the school's right to search a student's person or his locker has been little questioned. The Fourth Amendment's prohibition against unreasonable searches and seizures,

as applied to the states and their instrumentalities through the Fourteenth Amendment, was generally thought inapplicable to school searches. Several recent court opinions, however, clearly indicate that searches of a student and his locker are limited by the Fourth Amendment.

The Fourth Amendment prohibition against illegal searches has been construed to permit a search only when there is either a warrant authorizing it or probable cause or it is incident to a valid arrest.

When an illegal search is made because it does not comply with these requirements, four possible consequences may result. They are

(1) a civil suit for violation of privacy,

(2) a criminal prosecution for violation of privacy,

(3) inadmissibility in a criminal proceeding, and

(4) inadmissibility in a school proceeding.

Although the Fourth Amendment applies to school searches, it is not applied in the same way. Fishing expeditions are out, but when the school has reasonable grounds for the search, it can be made without a warrant or consent. [See Moore v. Troy State, 284 F. Supp. 725 M.D. Ala. (1968); and Overton v. Rieger, 311 F. Supp. 1035 (S.D.N.Y. 1970), cert. denied, 401 U.S. 1003 (1971).]

9. Mass Hearing. Mass demonstrations have raised the question of mass hearings. Can you try a hundred students at one time for the same offense? The answer is yes, if they are all being tried for the same issue, if they all have been involved in the same type of conduct, and if the mass trial does not prejudice the case of one against the other.

At the University of Colorado 65 students were tried at the same time and expelled for locking arms and denying access to university buildings. The mass-hearing procedure was upheld because the students had acted as a group. (See Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).)

10. Double Jeopardy. This aspect of the Fifth Amendment does not apply to school expulsion proceedings. There is no basis for the claim that students cannot be subjected to institutional proceedings if they are being tried in a court of law. As Professor Charles Wright of the University of Texas notes, "Claims of 'double jeopardy' are not uncommon, but are utterly without merit."

11. Public Hearing. The Sixth Amendment's protection does not apply to school discipline cases. I know of only one secondary school case that has ruled on the question of a student's right to a public hearing, and it held that the student had no such right. [See Pierce v. School Comm., 322 F. Supp. 957 (D. Mass. 1971).] Instead, two or three neutral observers will usually satisfy the requirement of a fair hearing.

12. Transcript. In the only case I know of that has ruled on the issue, a Massachusetts court held that a student does not have a constitutional right to a transcript. However, a transcript is necessary to avoid a de novo hearing at the review stage. The New Jersey Commissioner of Education recently said that since there was no transcript of a disciplinary hearing he could not review the proceedings. I suggest that hearings be recorded. If an appeal is taken, either administratively or by court review, then the tape can be transcribed.

13. Appeal. Most states have statutory provisions making a judicial review of the disciplinary decision available to the student, but most of the challenges to the substance or procedure of discipline proceedings have arisen in the federal courts under Section 1983 of the Civil Rights Act of 1971. A court review, however, is not an absolute constitutional requirement of due process in school cases.

14. Immediate Suspension. Teachers must have and do have emergency authority to deal temporarily with serious disciplinary problems. A student may be summarily suspended from school on a temporary basis for a serious breach of discipline. (The Tennessee statute requires application for readmission.) If the suspension is long-term, however, then the school must provide a hearing and observe other procedural safeguards.

15. Chronic Offender. A special problem exists with the chronic offender. I recommend that if a student is suspended for more than ten days during a semester, any additional suspension be followed by a review of the student's record by the hearing board. Repeated short-term suspensions should not be continued indefinitely.

16. Automatic Review. Courts have frequently ruled that expulsions cannot be extended into subsequent school years. I recommend that the cases of expelled students be reviewed at the end of the semester in which they are expelled (assuming that over a month has passed) to see whether reinstatement is in order.

CONCLUSION

The evolution of student procedural rights and the judicial protection of these rights will be regarded by many as a mixed blessing at best and at worst as a serious interference with internal school discipline and affairs. It should be remembered, however, that the schools must have and do have plenary authority to regulate conduct calculated to cause disorder and interfere with educational functions. The primary concern of the courts is that students be fairly treated and accorded minimum standards of due process of law.

In light of the changing nature of due process in this area, the need to understand students, and the importance of avoiding disruption of school operations, I recommend that school boards:

1. Adopt a grievance procedure for students and faculty.
2. Adopt written regulations on student conduct. These regulations should specify the potential penalty for a violation and the regulations should be made public and widely distributed. They should be worked out in consultation with principals, who should have a checklist of things to do before they take action.
3. Adopt written procedures for handling discipline cases.
4. Develop an emergency plan to deal with school disorders.

Times change. The absolute control exercised by school boards and school administrators over the operation of schools is gone. We have a new ball game, with part of the power once held by boards and administrators now held by teachers and students. We need to recognize this fact and then ask ourselves in what ways our relationships with students, parents, teachers, and administrators have changed, so that we

are not fooled by our own rhetoric as we work with these groups to make our schools more responsive to community needs and to produce a graduate better trained to accept responsibility in today's society.